BONG HIONG FATT & ORS *a*

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING *b*
IAN HC CHIN J
[CRIMINAL APPEAL NO: 42-03-2000-III(I)]
6 DECEMBER 2000

CRIMINAL PROCEDURE: *Conviction - Appeal against conviction - Penal Code, s. 326 - Caution statements of accused - Common intention of accused to cause grievous injury - Whether sufficiently addressed by trial court - Non-calling of particular witness by prosecution - Whether an adverse inference should be drawn* *c*

CRIMINAL PROCEDURE: *Sentence - Appeal against sentence - Offence under s. 326 Penal Code - Voluntarily causing grievous hurt by dangerous weapons or means - Imprisonment of 14 years, 10 years, 7 years and 3 years respectively of 4 accused - Whether excessive* *d*

The 1st, 2nd, 4th and 5th accused were convicted by the trial court under s. 326 of the Penal Code for voluntarily causing grievous hurt to one Thian Wee Siong. The offence was committed at the Kuching International Airport in Sarawak. They were sentenced to imprisonment of 14 years, 10 years, 7 years and 3 years respectively. The 1st accused was also ordered to be whipped 10 times. The accused now appealed against their conviction and sentence. *e*

The grounds of the appeal were: (1) that the trial court failed to sufficiently direct its mind to the caution statements of the accused and to the common intention of the accused to cause grievous injury to the victim; (2) that an adverse inference should be drawn for the non-calling of a particular witness ('the said witness') by the prosecution; and (3) that the sentences were manifestly excessive. *f* *g*

At the hearing of the appeal the accused sought to adduce further evidence.

Held:

[1] An application to adduce further evidence must satisfy the four conditions set out in *R v. Parks, ie,* it must be evidence (1) which was not available at the trial; (2) relevant to the issues concerned; (3) well capable of belief; and (4) capable of creating a reasonable doubt in the guilt of the appellant. *h*

i

[1a] The further evidence sought to adduce was an afterthought because the accused was of the view that a different approach should have been adopted for the trial and not that the existence of it was unbeknown to the defence. That meant that condition (1) above was not satisfied and on that ground alone the application should be dismissed.

[2] There was no question of the trial court not having directed its mind to the caution statements of the accused. The trial court had set out the gist of the caution statements and took note that there was no opportunity offered by the accused to be cross-examined as to what they had said there as opposed to the sworn evidence of the victim. The trial court also took note that the statements did not state how two of the accused came to suffer the injuries they did and that nevertheless they did not cast any reasonable doubt in the case of the prosecution. In the end, the trial court preferred the sworn evidence of the victim to the unsworn statements of the accused. It followed that the trial court had properly dealt with the caution statements.

[3] The law does not require all the witnesses of a crime to be called. Therefore, there was no substance in the contention that an adverse inference should be drawn for the non-calling of the said witness.

[4] The trial court was entitled to infer from the circumstances that there was a common intention to cause grievous injury to the victim since the victim had earlier assaulted one of them.

[5] The offence was committed by gangsters in full view of the public at a very large public place. That the accused had chosen that time and place demonstrated that they had scant regard for what the public thought of them nor with whether they were caught or not by the law since what they did could not but put fear in the public and could not escape the attention of those in the airport. So brazen were they that any lesser sentence would convey the impression that gangsters reign supreme in Sarawak and that the public had better fear them. The court must therefore not make that mistake in passing any lesser sentence.

[Appeal dismissed.]

Case(s) referred to:
Che Din Ahmad v. PP [1976] 1 MLJ 289 ***(refd)***
Mohamed Jamal v. PP [1964] 30 MLJ 254 ***(refd)***
Mohamed Salleh v. PP [1969] 1 MLJ 104 ***(refd)***
Ng Hoi Cheu & Anor. v. PP [1968] 1 MLJ 53 ***(refd)***
PP v. Adetunji Adeleye Sule [1993] 2 MLJ 70 ***(refd)***
PP v. Sanassi [1970] 2 MLJ 198 ***(refd)***
R v. Parks [1961] 3 All ER 633 ***(foll)***
Wong Heng Fatt v. PP [1959] MLJ 20 ***(refd)***

Legislation referred to:
Penal Code, ss. 304, 326

For the appellants - Orlando Chua; M/s Wong Orlando Chua & Co
For the respondent - Suhaimi Ibrahim, DPP

Reported by Usha Thiagarajah

JUDGMENT

Ian HC Chin J:

Introduction

Bong Hiong Fatt (1st accused), Tian Pian Shing (2nd accused), Ong Wei Khiong (4th accused) and Tan Wee Hock (5th accused) were all convicted of the following charge:

> That you, with few others still at large, on the 20th day of May, 1999 at about 9.30 p.m. at the Terminal of Kuching International Airport, in the State of Sarawak, in furtherance of the common intention of you all, voluntarily caused grievous hurt to one Thian Wee Siong (M) by dangerous means, to wit, a sword which is an instrument for cutting and you thereby committed an offence punishable under section 326 of the Penal Code and read with Section 34 of the same code.

They were respectively sentenced to imprisonment of 14 years, 10 years, 7 years and 3 years and, in the case of the 1st accused, he was also ordered to be whipped 10 times. Another person called David Chong Kwong Kiet, the 3rd accused, was acquitted at the close of the case for the prosecution.

The Evidence

During the trial, the only witness to testify as to the events resulting in injuries was the victim Thian Wee Siong. He said that on 20 May 1999 he quarreled with and punched the 5th accused at about 4.00p.m. to 5.00p.m. at a food stall. He had brought along his gang of two friends who also entered the fray by tackling the 1st accused and his friend. The assault was in retaliation for an earlier assault by the 5th accused on his brother. Then came the fracas at the terminal of the Kuching International Airport at around 9.30p.m..

He said he went with one Ah Siong to the airport to fetch a girl and while he and the girl were walking their passage was blocked by a gang of 10 to 20 persons of which he could recognise 9 or 10 of them. The four accused were identified as being present in the group, some of whom were armed with swords and wood. He said that it was the 1st accused who slashed him with a sword and this was after the 2nd accused had thrown a dustbin at him. He said he was slashed at the right ankle. He was also slashed on the head,

shoulder back and left leg. He was taken to a car driven by a person called Ah Ann with others present and these people were part of the gang that came to attack him. He was bleeding profusely as his ankle was almost severed and he pleaded with Ah Ann to take him to the hospital. He later passed out. When he regained consciousness, it was in the Sarawak General Hospital. There is no dispute that the injuries were grievous.

When cross-examined he denied that he had earlier called the 5th accused to meet him at the airport, that he had for that purpose brought along 15 to 20 of his friends and that it was his friends who had slashed him.

All the accused opted to give statement from the dock. They chose to merely tender the cautioned statements they had given to the police. Two doctors were also called to testify to the injuries suffered by a David Chong Kong Kiet who was earlier acquitted and the accused Tian Pian Shing who has also said that he was injured. The statements denied any attack or infliction of injury on the victim.

The name of "Ah Siong", as being the person who accompanied the victim to the airport was elicited through cross-examination by the erstwhile counsel for the accused.

Application To Adduce Further Evidence

At the hearing of the appeal the defence sought to have his evidence adduced. The 1st accused, in support of the application to adduce the further evidence deposed an affidavit in which he said the following. A person who claims to be "Lai Hon Hiung @ Ah Siong" bumped into the 1st accused at the lobby of a hotel on 9 August 2000 and he pleaded with him to be a witness "in a case involving a sudden gang fight at the Kuching International Airport on 20 May 1999". The 1st accused asserted that this person would be able to say that all the accused were not armed and were not responsible for the injuries suffered by Thian Wee Siong. Lai Hon Hiung @ Ah Siong made a statutory declaration which was adduced in support of the application. The declaration is in these terms:

1. On or about 9 August 2000, I met Bong Hiong Fatt @ Ah Huat ('Ah Huat') at the lobby of the Hilton Hotel, Kuching. I was informed by him that he urgently needed my help and he pleaded with me to be a witness in a case involving a sudden gang fight at the Kuching International Airport on 20 May 1999 whereupon one of my friends Thian Wee Siong @ Siong Chai ('Siong Chai') was seriously injured.

2. At first I was reluctant and apprehensive. Ah Huat managed to persuade me to tell the truth as to what actually transpired that evening at the Kuching International Airport, *ie*, not to side any party but just stand out and tell the right version.

3. Prior to 20 May 1999, Ah Huat and I were not on bad terms and I have nothing against him personally. Similarly Siong Chai and I are friends. I was told by Ah Huat that in the course of the trial at the lower court my name was mentioned by Siong Chai that I was with him at the Kuching International Airport that evening. That is correct.

4. I am therefore able to tell what exactly transpired on the evening of the 20 May 1999 as I was with Siong Chai. Together with the two of us were our friends Ah Seng, Richard and Ah Leong. Prior to going to the Kuching International Airport I was told by Siong Chai that we were to meet up with Tan Wee Hock @ Ah Boy ('Ah Boy') to negotiate compensation to be made by Ah Boy for the latter's assault on Siong Chai's younger brother. That meeting was arranged by Siong Chai.

5. Upon arrival at the Kuching International Airport at about 9.00p.m. we waited for Ah Boy to appear. Soon after our arrival Ah Boy came to the Kuching International Airport with two of his friends and whom I could recognise as David Chong Kwong Kiet and Ong Wei Kong @ Ah Chee ('Ah Chee').

6. When Ah Boy and Siong Chai came face to face with each other Siong Chai started to demand RM30,000 as compensation from Ah Boy. When the two of them were negotiating I merely stood about five feet away from them. My role that evening was merely to act as a witness to the negotiation/settlement.

7. I heard Ah Boy telling Siong Chai that he had no such money to pay him and upon hearing that Siong Chai said loudly that the matter could not therefore be settled. It was at this point that I saw Tian Pian Shing @ Ah Sin ('Ah Sin') coming down from a car of which Ah Huat was the driver. I understand from Siong Chai that Ah Sin was his school-mate and friend. I then saw Ah Sin rushing towards Ah Boy and Siong Chai shouting "Don't fight! Don't fight!" and whereupon Siong Chai shouted back at Ah Sin, "Do you want to be involved too?" and all of a sudden I saw Siong Chai producing a cock-fighting spur and lashed out at Ah Sin and injured him. It was at this time that I heard loud noises of people rushing from behind us some of whom I could recognise as Siong Chai's friends *viz*. Ah Ann, Ah Bee, Ah Peng, Ah Kien many of them were armed with parangs and all hell broke lose. I was frightened as I have

never seen so many people fighting before and so I quickly ran away from the scene and went home. When I was asked by Ah Huat to be a witness I recounted the event and I could recall that none of them *ie*, Ah Huat, Ah Boy. Ah Sin and Ah Chee were armed. As to how Siong Chai was injured I was later told by him that in the mass confusion of the fight he could not positively say as to who had injured him.

8. Since the incident at the Kuching International Airport, I had not met up with Ah Huat, Ah Boy, Ah Sin or Ah Chee and none of them knew how to contact me until the chance meeting as aforesaid in para. 1.

9. I am making this declaration knowing that I will be required to be a witness whenever called upon by the court and I further say that I am making this declaration out of my own free will.

It is the law that an application to adduce further must satisfy the four conditions out in *R v. Parks* [1961] 3 All ER 633, 634 (and followed in *Mohamed Jamal v. PP* [1964] 30 MLJ 254) *viz*:

(1) the evidence that it is sought to call must be evidence which was not available at the trial;

(2) it must be evidence relevant to the issues;

(3) it must be evidence which is credible evidence in the sense that it is well capable of belief; and

(4) the evidence is capable of creating a reasonable doubt in the guilt of the appellant.

Whether The Evidence Was Available At The Trial

The person called Ah Siong was known to the 1st accused and this can be seen from the following paragraph of his affidavit:

7. In view of the advise given to me by Mr. Wong Sing Nang as aforesaid in para. 4 I have since been looking high and low for the said Ah Siong but to no avail until 9 August 2000 when I bumped into him at the lobby of the Hilton Hotel, Kuching. Prior to that neither I nor the rest of the appellants had any means of contacting Ah Siong.

It will be recalled that this person emerged during cross-examination by the erstwhile counsel of the accused during the trial. This means that when that name was mentioned, the accused knew who he was and this is expected since they were all at the airport. The erstwhile counsel did not, at the trial, ask for any witness summons to be issued for this person to give evidence for the accused. This can only mean that the evidence of this person was, in the

view of the accused and their counsel, either irrelevant or of no assistance to the case of the defence and not that it was not available at the trial. It was an after thought and because the present advocate was of the view that a different approach should have been adopted for the trial that the accused now want the evidence of Ah Siong and not that the existence of this evidence was unbeknown to them or their counsel at the trial. This means this condition cannot be satisfied and on this ground alone, the application could be dismissed. I accordingly earlier dismissed the application. I do not propose to go into the other conditions because any failure to satisfy any one of the conditions would prevent fresh evidence from being adduced (*Che Din Ahmad v. PP* [1976] 1 MLJ 289). I turn now to the appeal proper.

Grounds Of Appeal

Against the conviction, 12 grounds were put forth as to why it should be set aside, of which ground no. 3 and no. 8 had been abandoned while another is just general. I will deal with all the remaining grounds together as most involve the finding of facts by the lower court.

It was contended that the lower court had misdirected itself when it failed to consider (1) the improbability of the evidence of the victim that the accused had staged an ambush against him at the airport "when there was no credible evidence if at all to suggest that the movement of [the victim] that particular evening was made known or known to the [accused]" and (2) the possibility that the encounter at the airport was prearranged between the victim and the accused. The short answer to those issues is that there is no dispute that the accused and the victim met at the airport. It is the prosecution's case that there was this encounter at the airport which resulted in the victim being grievously injured. It is not necessary for the prosecution to prove how the accused got wind of the presence of the victim at the airport in order to set upon him there. For that matter, even if the victim had arranged for it the prosecution case would still be dependent on whether the accused were there, whether the victim was slashed and by whom all of which were proven at the end of the case for the prosecution. In this regard, the prosecution's case is not entirely on the oral testimony of the victim but also on the injuries suffered by the victim. It was put to the victim during his cross-examination that it was the victim who had brought along the 10-20 persons and it was they who had slashed him. That was the case of the accused as put forth to the victim and which the victim denied.

All the accused elected not to testify and, according to their erstwhile counsel, had elected to give statements from the dock. They then referred to their caution statements. Those statements were given after some of their pictures were published in the newspaper by the police who were looking for them and after they had surrendered to the police, namely the 1st accused and 2nd accused on 10 June 1999 and the rest on 19 July 1999.

A wholly exculpatory statement made out of court is not by itself sufficient to discharge the onus that lies on the accused of rebutting a presumption (*PP v. Adetunji Adeleye Sule* [1993] 2 MLJ 70). That statement of law, in my view, could apply also to rebutting a prima facie case which is that such a statement is not by itself sufficient to prevent a prima facie case from arising where there is evidence to support such a case. What is needed in addition to that statement is the evidence to the same effect of the accused themselves before the accused are entitled to take advantage of them to say the statements are consistent with their evidence (*PP v. Adetunji Adeleye Sule*). In the present case the accused did not testify and therefore could not be said to have given any evidence which is consistent with what they have said in their caution statements. Instead, the accused merely "tender" the caution statements from the dock. But they are treated by all parties at the lower court as being statements made from the dock and I will accept that to be the case too. How, then, should the court treat a statement from the dock?

In *Wong Heng Fatt v. PP* [1959] MLJ 20 it was held that a statement from the dock is not evidence but this was not followed in *Ng Hoi Cheu & Anor. v. PP* [1968] 1 MLJ 53 where the court held that a statement from the dock is evidence for what it is worth which entitles the accused or counsel to address the court. Then came *PP v. Sanassi* [1970] 2 MLJ 198 which held that an accused has a right to make an unsworn statement from the dock but such a statement does not constitute evidence and the accused making such a statement cannot be a witness. This controversy appears to me to have been resolved by the Federal Court in *Mohamed Salleh v. PP* [1969] 1 MLJ 104 FC where, *inter alia*, it was held that it is proper for a judge in his summing up to remind the jury that a statement from the dock is not sworn evidence which can be the subject of cross-examination; that they can attach to it such weight as they think fit and that they should take it into consideration in deciding whether the prosecution have proved their case. So, it is the law that the court must consider an unsworn statement of an accused person. It remains to be examined whether this has been done in this case.

It was contended that the lower court had failed to sufficiently direct its mind to "the evidential value" of the caution statements. Since no complaint was directed at the correctness in which the lower court had summarised those statements, I will reproduce that part of the judgment here:

> I have read carefully the caution statements of each of the accused… There is no need to go into the details. Essentially they contain what has been put to the victim PW2 in cross-examination, that there was an earlier fight and that PW2 and his gang had attacked the accused's gang after failure of settlement of the demand amount of $30,000 by the victim. There was denial of the infliction of the ... injury by the 1st accused and by the 4th and 5th accused denial of involvement in the attack.

There is, therefore, no question of the lower court not having directed its mind to the caution statements. In fact he had given them all the consideration that they deserved, by setting out the gist of the caution statements, by taking note that there was no opportunity offered by the accused to be cross-examined as to what they have said there as opposed to the sworn evidence of the victim then and by noting that the statements did not state how two of the accused came to suffer the injuries they did and nevertheless came to the conclusion that they do not cast any reasonable doubt in the case of the prosecution. In the end, after considering the statements, the lower court preferred the sworn evidence of the victim to the unsworn statements of the accused. In my view, the lower court had properly dealt with the caution statements and I can see no merit in this ground of the appeal. It is a matter of no consequence whether you term the caution statements as evidence or not but the court must consider them and it had been done in this case.

As for the non-calling of the girl whom the victim had gone to the airport to fetch, it must be remembered that the law does not require all the witnesses of a crime to be called. I will not bother to cite any authority as this is settled law. Therefore, there is no substance in the contention that an adverse inference should be drawn for the non-calling of this witness. Another ground is directed at the discrepancy in the evidence of the victim and that of the investigating officer as regards the actual accused who inflicted the injuries which the lower court was of the correct view that they are of no consequence and I cannot see how the lower court can be faulted for that conclusion. After all, all the accused came together with the purpose of an assault on the victim after an earlier encounter in the food stall. But it was contended that the lower court had failed to direct its mind "sufficiently on the issue of common intention". In this regard the lower court had made the following finding:

> On the evidence of the victim (PW2), he identified [the 4th accused and the 5th accused] as being present although they did not attack him. However, it was [the 5th accused] with whom the victim had quarreled earlier and in regard to which this attack at the Airport was triggered. Thus [the 5th accused] must have known earlier of the confrontation at the Airport and must have been involved in the plot or the intention to attack the victim.

It was contended that there could be an alternative innocuous explanation for all the accused to be present there and that was because it was pre-arranged for the purpose of discussing a settlement of the matter and as requested by the victim, especially, it was contended, when the 3rd accused and the 4th accused admittedly did not attack the victim. For that argument to succeed, the accused would have to rely on their cautioned statements that their presence at the airport were at the request of the victim. In this regard, the lower court had considered it and preferred the sworn evidence of the victim that he did not arrange to meet the accused at the airport. Therefore, the lower court was

entitled to infer from the circumstances that there was a common intention to cause grievous injury to the victim since the victim had earlier assaulted one of them. Again, there is no merit in this ground of appeal. This leaves the question of the sentence.

Appeal Against Sentence

The accused complained that the sentences are "manifestly excessive" in their petition but their counsel added that they are "unsuitable in the circumstances of the case". It was argued that even for manslaughter, sentences of between 8 to 12 years of imprisonment were handed down, arguing I assume, that the present offence is of a less serious nature. But s. 326 of the Penal Code under which the accused were sentence provides an equally severe sentence if not more so, *viz*.:

> 326. Voluntarily causing grievous hurt by dangerous weapons or means.
>
> Whoever, except in the case provided by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing, or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine or to whipping.

There is a provision for whipping which is not present in s. 304 of the Penal Code which reads:

> 304. Punishment for culpable homicide not amounting to murder.
>
> Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment for a term which may extend to ten years, or with fine, or with both if the act is done with the knowledge that it is likely to cause death but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

Therefore, the sentences imposed under s. 304 cannot be a correct measure for offences under s. 326. Offences under s. 304 are commonly of the impulse type, that is not pre-planned, and hardly ever involving gang or gangsters. The present case is committed by a gang of people who could be properly called

gangsters. The offence was committed in full view of the public at a very public place. That the accused have chosen that time and place demonstrated that they have scant regard for what the public think of them nor with whether they are caught or not by the law since what they did cannot but put fear in the public and cannot escape the attention of those in the airport. So brazen were they that any lesser sentence would convey the impression that the gangsters reign supreme in Sarawak and that the public had better fear them. The court must therefore not make that mistake in passing any lesser sentence. The lower court had considered all the relevant factors before the sentences were handed down and the accused could not point to any of those considerations as being wrong in law nor to any failure to consider relevant factors.

Conclusion

In the premises the appeal is dismissed.